THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

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May 16, 1975

The Honorable Tom C. Massey
Chairman, House Committee
on Public Education
House of Representatives
Austin, Texas 78767

Letter Advisory No. 105

Re: Constitutionality of House Bill 1020 which would provide free textbooks to non-public schools.

Dear Representative Massey:

You have requested our opinion concerning the constitutionality of House Bill 1020, which would provide for the distribution of state owned textbooks to the pupils of nonpublic schools.

In our understanding the bill would permit only those textbooks adopted by the State Board of Education for use in public schools to be provided to pupils of qualified nonpublic schools. These nonpublic schools would be required to submit an application to the Central Education Agency for certification as a "qualified" school. Such schools must be nonprofit; their income must be used solely to defray costs directly attributable to school purposes; and they must adhere to a non-discriminatory enrollment policy. The Commissioner of Education is to furnish each public school district a list of qualified nonpublic schools located in the district. The superintendents of the districts are to distribute the books to the pupils and will be the legal custodians of such books. All books must be returned or accounted for at the end of the school term or session or when a pupil withdraws from the nonpublic school. The nonpublic schools are to report the maximum level of attendance in each grade level to the proper school superintendent. The program will be financed from the "Supplemental Textbook Fund" and no funds raised or dedicated to the public schools of the State shall be utilized.

In our view the relevant constitutional provisions are the establishment clause of the First Amendment of the United States Constitution and article 1, section 7 of the Texas Constitution.

Under the establishment clause a statute must satisfy three tests. It must have a valid secular purpose; its primary effect must be one that neither advances nor inhibits religion; and it must not foster an excessive government entanglement with religion. Tilton v. Richardson, 403 U.S. 672 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971); Attorney General Opinions H-511 (1975); H-66 (1973).

It is well established that "a State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate," and that this concern is a valid secular purpose Lemon v. Kurtzman, 403 U.S. at 613; Norwood v. Harrison, 413 U.S. 455 (1973); Tilton v. Richardson, supra; Board of Education v. Allen, 392 U.S. 236 (1968); Cochran v. Louisiana Board of Education, 281 U.S. 370 (1930).

While school textbook programs may in some manner aid in the advancement of religion, the Supreme Court has held them to be valid since any such aid is not the primary effect of the program. Board of Education v. Allen, supra. In Allen the Court upheld a New York program which, like House Bill 1020, provided textbooks to nonpublic school pupils with ownership remaining in the state. In Lemon v. Kurtzman, supra, the Court cited Allen with approval but struck down the textbook program before it. The Court placed great emphasis on the fact that the Lemon program provided the books to the schools rather than the pupils. While the provision of textbooks to religious schools is among the issues now before the Supreme Court in Meek v. Pittinger, 374 F.Supp. 639 (E.D. Pa. 1974), prob. juris. noted, 43 U.S.L.W. 3207 (U.S. Oct. 15, 1974), so long as the holding of Allen has not been overruled, it is our opinion that House Bill 1020 would not be invalid as having the primary effect of enhancing religion. See also Norwood v. Harrison, supra.

House Bill 1020 provides for certification and reporting procedures which would require some contact between religious schools and the state. While it is not clear what quantum of contact would violate the establishment clause due to excessive entanglement, the Supreme Court has suggested a similar procedure in Norwood v. Harrison, supra. In holding that Mississippi may not provide textbooks to pupils of "institutions that practice racial or other invidious discrimination," p. 467, the Court suggested a certification procedure by which a school:

> . . . should . . . affirmatively declare its admission policies and practices, [and] state the number of its racially and religiously identifiable minority students. . . . 413 U.S. at 471.

That case involved private schools including church schools. This procedure would involve substantially the same contact as would House Bill 1020, and it is therefore our opinion that the latter would not foster an excessive governmental entanglement with religion.

Accordingly, it is our opinion that House Bill 1020 would not violate the establishment clause of the First Amendment. Additionally, since schools which practice discrimination are excluded, the program would not aid in the establishment of segregated schools. Norwood v. Harrison, supra.

Article 1, section 7 of the Texas Constitution provides:

> No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes.

While this provision has been broadly construed to prohibit incidental aid in the form of school bus transportation, Attorney General Opinions O-7128 (1946), O-4221 (1941), the later decisions of this Office and the reasoning of the subsequent United States Supreme Court cases render these older decisions questionable. See Everson v. Board of Education, 330 U.S. 1 (1947).

This Office has addressed the question of the validity of tuition equalization grants to private school students and has found such aid does not necessarily constitute appropriations for the benefit of any sect or religious society. Attorney General Opinions H-66 (1973), M-861 (1971), and LA 47 (1973). The same result has been reached with respect to both work-study grants, Attorney General Opinion M-391 (1969), and the use of public school facilities by parochial school students. Attorney General Opinion M-1074 (1972).

In Church v. Bullock, 109 S.W. 115 (Tex.Sup. 1908), the Court viewed religious exercises in public schools as inuring to the moral benefit of the students rather than to the benefit of any sect or religious society.

> It was the purpose of the Constitution to forbid the use of public funds for the support of any particular denomination of religious people . . . 109 S.W. at 117.

In In Re Legislature's Request For An Opinion, 180 N. W. 2d 265 (Mich. 1970), the Michigan Supreme Court reviewed a program for the payment of lay teachers teaching secular subjects in nonpublic schools. In assessing the program's constitutionality under article 1, section 4 of the Michigan Constitution, which contains an identical provision to our article 1, section 7, see Attorney General Opinion M-1074 (1972), the Court held:

> . . . we cannot construe the purchase of secular educational services to be support of a 'place of worship.' . . .
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> . . . To adopt a strict 'no benefits, primary or incidental' rule would render religious places of worship and schools ineligible for all State services. There is no evidence, furnished or imaginable, that the people intended such a rule when they adopted this provision of the Constitution. . . . 180 N. W. 2d at 274.

The supply of secular textbooks involves minimal benefits to the sectarian activities of nonpublic schools. Board of Education v. Allen, supra. Any such benefit would be incidental in nature and would not cause a violation of article 1, section 7. See Attorney General Opinion O-3386 (1941). Accordingly, House Bill 1020 would, in our view, probably be held to be constitutional.

Very truly yours,

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APPROVED:

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